Smith v. The Abandoned Vessel Doc. 34

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION H-07-784**
	§	
THE ABANDONED VESSEL,	§	
In rem	§	
Defendant.	§	

NATHAN SMITH'S SUR-REPLY TO INTERVENOR SORENSON'S REPLY REGARDING SORENSON'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

COMES NOW, Plaintiff, Nathan Smith ("Smith"), and files this Sur-Reply to Intervenor Sorenson's ("Sorenson's") Reply ("Reply") Regarding Sorenson's Motion to Dismiss (the "Motion"). Smith would respectfully show this Court as follows:

I. Introduction

1. Sorenson argues that this Court cannot maintain admiralty jurisdiction absent a showing that the waters are commercially navigable. This argument is without merit. Waters need not be commercially navigable to create admiralty and maritime jurisdiction.

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II.
Waters Need Not Be Commercially Navigable for Admiralty Jurisdiction

2. Sorenson contends in her Reply that Smith has the burden to not only prove that the abandoned vessel is located in navigable waters, but also that those waters are accessible for commercial water traffic. *Reply at ¶4, See Docket Entry No. 32.* Sorenson asserts the suit must be dismissed because Smith's declaration does not state "that the vessel is located in waters that are accessible for commercial water traffic or that the route from the vessel to the Mission River and thence to the Gulf of Mexico is accessible for commercial water traffic." *Reply at ¶4, See Docket Entry No. 32.*

3. This is not the test. The United States Supreme Court, in *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1871), relied upon by Sorenson, stated waterways are navigable if "they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563. The Court specifically referenced trade and travel, and this has been interpreted to mean either one by both the Fifth Circuit and the U. S. Supreme Court.

4. In *Richardson v. Foremost Ins. Co.*, 641 F.2d 314, 316 (5th Cir.1981), a suit involving a collision between two pleasure boats on the Amite River in

Louisiana, the court held that requiring waters to be commercially navigable in order to find admiralty jurisdiction would "be injecting an uncertainty that would plague litigants and the courts." The Court said, "Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems." *Richardson*, 641 F.2d at 316. "As a general rule, "[j]urisdiction should be as readily ascertainable as courts can make it." *Richardson*, 641 F.2d at 316. Finding admiralty jurisdiction existed, the court in *Richardson* noted that the accident giving rise to the litigation occurred on the upper reaches of the Amite River, a place which is seldom, if ever, used for commercial activity. *Richardson*, 641 F.2d at 316.

5. The United States Supreme Court affirmed *Richardson,* noting, "the federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity." *Foremost Ins. Co., v. Richardson*, 457 U.S. 668, 675 (1982).

6. In *Sanders v. Placid*, 861 F.2d. 1374, 1377 (5th Cir.1988), a case involving a motor boat which struck a submerged pipe during a hunting trip, the Fifth Circuit found admiralty jurisdiction existed and said "navigable waters of the United States are those waters capable, in fact, of navigation in interstate travel or commerce...." The Court said nothing about commercial activity. It is sufficient

if the waters are capable of interstate travel. *Sanders*, 861 F.2d. at 1377; *see also Hardwick v. Pro-Line Boats, Inc.*, 895 F.Supp. 145, 147 (S.D. Texas 1995) ("It is also clear that in this Circuit nexus is clearly present for maritime jurisdiction when an accident involves a pleasure-boat accident and is *not* limited to litigation involving only commercial activity on navigable waters."(emphasis added)).

7. Based upon established precedent, Smith is not required to prove that the abandoned vessel is located in waters accessible for commercial traffic. *See e.g. Richardson*, 641 F.2d at 316. Smith's Declaration states that he found the vessel in navigable waters, that he has been to the vessel by boat, and that a person could travel from the vessel to the Mission River, from the Mission River to the Gulf of Mexico and other states in the United States. *See Exhibit A to Smith's Response; Docket Entry No. 30.* This is sufficient to show that the waters are capable of interstate travel. Smith is not required to show commercial navigability for the Court to maintain admiralty jurisdiction over this case.

II.
CONCLUSION

WHEREFORE, Smith requests the Court deny Intervenor Sorenson's Motion to Dismiss or, in the alternative, grant Smith leave to amend the complaint, and for such other and available relief as may be appropriate.

Respectfully submitted,

/s/ Richard A. Schwartz

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CERTIFICATE OF SERVICE

I certify that on the 30th day of November 2007, a true and correct copy of the foregoing ***Nathan Smith's Sur-Reply to Intervenor Sorenson's Reply Regarding Sorenson's Motion to Dismiss*** was served on the counsel by facsimile and first class U.S. mail.

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